Based on the seizures, and without even contacting persons whose names appeared in the voluminous seized paperwork to determine if they had willingly provided their names and data to petitioner, she labeled them as "victims." *See* RT 3570: "I did not check every victim name in this." Yet, the agents seized 30-35 boxes of paperwork with third persons names and data and labeled it theft "profile" evidence.[3]

Petitioner's objection to Agent Timar's profile labeling should have been sustained. This was irrelevant, conclusionary, unfounded and highly prejudicial. Agent Timar should simply have testified she found the evidence of names and related personal data without attaching the conclusionary profile label to all of the boxed material seized, much of which was not ever introduced. The State could have argued in final argument the conclusion to the jury that the evidence was possessed for identity theft. Of course, because a prosecutor can only argue evidence in the record and the fair inferences therefrom, no argument could been made that all the data seized was identity theft evidence because much of it was not ever introduced. The possession of names and personal data is itself innocent conduct, especially for petitioner who used

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[3] Fox also labeled as "victims" persons with whom petitioner had business thus adding a second argumentative label to his opinions. Labeling persons as "victims" in this context was wholly improper. *See* Jackson v. State, 600 A.2d 21, 24 (Del. 1991)("We agree with defendant that the word "victim" should not be used in a case where the commission of a crime is in dispute"); *accord* Allen v. State, 644 A.2d 982, 983 n.1 (Del. 1994); Veteto v. State, 8 S.W.3d 805, 816-817 (Tex. App. 2000); State v. Wright, 2003 Ohio 3511, P6 (Ohio Ct. App., 2003). Petitioner objected to Fox's labeling of persons as "victim." RT 4241-4242.

that information to obtain legitimate car loans for customers as several of his customers testified at the trial.[4]

The State's case was thus given a huge unjustified advantage by labeling nearly all the voluminous seized paperwork as theft "profile evidence." This was not only unjustified, but the general labeling of all the physical evidence, much of it unidentified, put the burden on the petitioner to explain it.

The prosecutor, in arguing jury instructions, stated that the profile evidence was a form of other crimes evidence: "...is the profile evidence not considered [California Evidence Code §]1101(b)[5] as we have been arguing throughout the course of this case?" RT 6325. This was hardly innocuous, informational, background evidence that the Opinion suggests, at App. 8-9: "the two experts properly explained to the jury the voluminous evidence about how credit car and loan financing fraud operates without using improper profile evidence." They did far more than that.

B. The "Consistent with Fraud" Labeling by Fox. District Attorney investigator Fox testified over objection and labeled the financial transaction documentation he reviewed and other *behavior* of petitioner as "consistent with fraud."[6]

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[4] A prosecution witness, Lucero, who worked with petitioner on car loans, testified that they did legitimate car loans.

[5] This statute allows bad act evidence if it helps prove intent or other relevant facts at issue.

[6] The defense objected Mr. Fox's guilt labeling conclusions. (RT 4003.) It would "invade the province of the jury, it also is asking for a legal conclusion [and would be]...extremely

(continued...)

Like Agent Timar, Fox was allowed to label essentially everything in evidence that he reviewed as "consistent with fraud." Fox testified: "My opinion is that everything we have discussed ... when I talked and interviewed the victims, they knew nothing about.... all this type of evidence that is consistent with other investigations I have been involved in." (RT 4241-4242.)

The California appellate court erred in its summary conclusion that the evidence merely spoke to how credit card and loan frauds worked. App. 8-9. As noted, the prosecution presented the evidence as bad act evidence under California Evidence Code section 1101(b). RT 6325. That is not mere background evidence. It was used as evidence of guilt as any common sense reading of the testimony would indicate.

Further, contrary to the Opinion, the experts **did** testify about the "defendant's behavior, appearance, or personality." App. 8-9. Beginning at RT 4226, Fox characterized the following evidence in this case as "consistent with fraud."

> O "money flowing through various accounts and paid out to the defendants....using multiple accounts to move the money through, is consistent with what I have seen in other fraud cases." RT 4226.
>
> O Exhibit 306 ... those fictitious business names... is that another factor...? A. Yes." RT 4227. "And those individuals, in my investigations, my experience, will use that as a business front ... and they use that business to conduct fraud. RT 4227.
>
> O using someone's identity and attempting or

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[6](...continued)
prejudicial" (RT 4006.)

obtaining loans from a company.... they are having to manufacture employment, pay stubs, tax returns. RT 4229.

O the payments that were made on John Ferguson's loan to USAA were consistent with fraud because there were other loans pending. RT 4230.

O The use of the 184 Sir Bedivere address on the Ferguson and Blaine loans. RT 4234, 4235. The place of employment for Ferguson and Blaine (Capital Finance and Capital Investments) was "consistent in my fraud investigations to have the perpetrators of the fraud using addresses... they have control over...." RT 4235.

O Petitioner's phone number being used on the Ferguson and Blaine loans. RT 4236, 4237. This was "consistent with other investigations where the person perpetrating the fraud is using their phone number." RT 4236.

As to "behavior," Fox was allowed to testify that the manner in which petitioner and two others entered a Post Office "to pick up the check ... [t]hat's very consistent with what I've seen in other fraud cases." RT 4241. Further, in a flourish at the end of his direct testimony, the prosecutor asked for Fox to sum up: "do you have an opinion as to whether or not this activity is consistent or inconsistent with fraud?" He received the response, "My opinion is that everything we have discussed...when I talked and interview- ed the victims, they knew nothing about.... [objection overruled]...all this type of evidence that is consistent with other investigations I have been involved in."

To make sure the jury got the message, the prosecutor

asked: "So your opinion.... this activity... of *all this activity is consistent with fraudulent activity*?

A. Yes." RT 4241-4242; emphasis added.

Like Timar's labeling, Fox's conclusions should have been excluded. Neither he nor Timar were experts in the auto sales or car loan business, and this lack of knowledge made it easy for them to place guilt labels on evidence that was perfectly consistent with innocence.

C. Police Agent Conclusions on Theft Profiles and "Consistent with Fraud" Deny the Accused Due Process of Law. These labels were inadmissible and highly prejudicial evidence that permeated the entire prosecution case. Similar prosecution expert opinion evidence, but hardly as far ranging in pervasiveness, has been found to deny the constitutional right to a due process fair trial. (*See, e.g.,* Maurer v. Dept. of Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994)(denial of due process of law to admit testimony from witnesses, including two police officers, that the victim was "sincere" in her claim of rape); Cooper v. Sowders, 837 F.2d 284, 287-288 (6th Cir. 1988) (officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unfair" trial); U.S. ex rel Imari Clemons v. Walls, 202 F. Supp. 2d 767 (N.D. Ill. 2002)(due process violated with use of "gang" evidence).

"This allegedly expert opinion evidence often is simply an argument of counsel dressed up in the pseudoscientific language of expert opinion. We agree that trial courts need not, and in most cases should not, tolerate such a practice." People v. Johnson, 19 Cal.App.4th 778, 786-787 (1993) (banning defense expert on nature of jailhouse informants.) This language fits perfectly the testimony of the prosecution home-grown experts in this case.

California cases are not consistent in how far law

enforcement witnesses may go in opining on guilt. *See* People v. Torres, 33 Cal. App. 4th 37, 47-48 (1995) ("we conclude it was improper for Officer Thacker to testify as to the meaning of the terms robbery and extortion and to express the opinion the crimes committed in this case were robberies. Furthermore, under the facts of this case, expressing the opinion the crimes were robberies was tantamount to expressing the opinion defendant was guilty of robbery and the first degree felony murder of Argueta.")

D. Prejudice from the Due Process Violation.

Petitioner's trial counsel objected that this evidence invaded the jury's essential functioning. On appeal and in his petition to the California Supreme Court, he particularized it as both a federal due process and right to jury determination in violation of the U.S. Constitutional guarantees of the Fourteenth Amendment. The state Court of Appeal, not finding error, did not assess the constitutional question.[7] (*Cf.*, Castilles v. Peoples, 489 U.S. 346, 350 (1988), citing Smith v. Digmon, 434 U.S. 332, 333 (1978) (not addressing the issue

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[7] Where an objection is made at trial and on appeal new alternative legal conclusions are asserted, California appellate courts entertain them. *See, e.g.*, People v. Yeoman, 31 Cal.4th 93, 117 (2003) where trial counsel made objections to certain evidence but not on 8th Amendment grounds, the Supreme Court reviewed the merits on that non-stated basis because "[d]efendant's new claim ... merely invites us to draw an alternative legal conclusion (*i.e.*, that the death sentence is arbitrary and unreliable) from the same information he presented to the trial court." *See also* People v. Sakarias, 22 Cal.4th 596, 630 (2000) (hearsay trial objection ruled on a constitutional confrontation basis).

for lack of finding any error does not mean the issue is not preserved.)

Due to the pervasive use of guilt labels by the prosecution witnesses, petitioner was denied due process of law and a right to an impartial jury determination of the facts under the 14th and 6th Amendments of the U.S. Constitution. The Opinion deems any errors as harmless because of "the very strong evidence of defendant's admitted level of involvement with two admittedly fraudulent car loans." App., p. 9. Petitioner made no such admissions of wrongdoing. On the contrary, he testified (and was corroborated) that in the Martinez loan, he processed it properly and that two admitted crooks name Potter and Mikhail deceived him in the loan process by using Martinez's identity to attempt to get the loan (which never was perfected). As to Ferguson, that loan deal was legitimate. The defense evidence showed that Ferguson simply backed out of the business plan after the loan funded and the car was purchased. Then he stole the car.

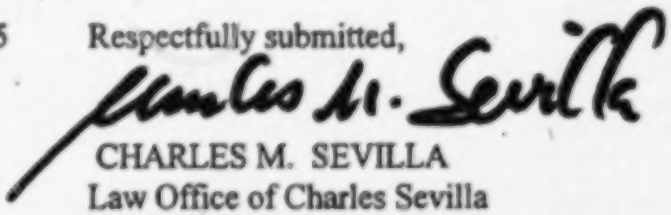
Evidence of the closeness of the case that shows the errors were outcome determinative are: The jury did not convict on all counts. The jury deliberated six days and sent out nine notes before returning verdicts on the seventh day. CT 595-610. Thus, this is not a petition about hypothetical constitutional error. The errors here made the difference.

CONCLUSION

It is respectfully requested that petitioner's petition for *certiorari* be granted.

August 10, 2005

Respectfully submitted,



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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

THE PEOPLE,	)	
Plaintiff and Respondent,	)	E033792
v.	)	(Super.Ct.No. RIF90125)
JAMAL NATHAN DAWOOD,	)	
Defendant and Appellant.	)	OPINION
	)	

APPEAL from the Superior Court of Riverside County. Russell F. Schooling, Judge. (Retired Judge of the former Mun. Ct. for the L.A. S.E. Jud. Dist., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Cleary & Sevilla and Charles M. Sevilla for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Sharon L. Rhodes and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Defendant and four other codefendants[1] were implicated in a complicated series of credit card and car loan transactions

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[1] Ronnie Dawood, defendant's brother; Wagdy Dawood, unrelated to defendant; Sunil Bhasin; and Daniel Lucero.

involving other people's personal and financial information that had been stolen or used without authorization. A jury convicted defendant of nine criminal counts (1 through 9) involving identity theft and two fraudulent car loans. Defendant was acquitted on counts 10, 11, and 31 and not convicted on counts 12 and 13.[2]

The jury found not true all the charged enhancements on counts 8, 9, 10, 11, 13, and 31, that over $50,000 was taken per Penal Code section 12022.6, subdivision (a).[3] The court sentenced defendant to a total sentence of five years four months.

On appeal, defendant protests: the admission of "identity theft" profile evidence; the trial court's instructions on consciousness of guilt; the duplication of conspiracy in counts 2 and 4; the insufficiency of evidence to support count 7 for forgery; a violation of section 654; and other cumulative evidentiary and instructional error. Defendant also asserts *Blakely* error. (*Blakely v. Washingon* (2004) ___ U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403].) We reject all defendant's contentions and affirm the judgment against him.

2. Factual and Procedural Background

While acknowledging the elements of defendant's defense, we recite the facts in the style most favorable to the judgment. The prosecution presented evidence defendant was engaged in various fraudulent activities involving credit cards and car financing scams. Defendant presented evidence he was acting legitimately as an automobile broker to pay for his medical school education.

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[2] Three other counts, 14, 17, and 24, were dismissed against defendant.

[3] Unless otherwise stated, all statutory references are to the Penal Code.

A. *Prosecution Evidence*

John Ferguson, a methamphetamine user, worked for codefendant Bhasin, a physician, in Bhasin's bicycle shop. Ferguson received clothing and room and board from Bhasin in exchange for work.

Through Bhasin, defendant met Ferguson in 1997 and offered to help improve his credit by creating a phony history of paid loans. Ferguson gave defendant his social security and driver's license numbers. At defendant's behest, and believing it was only a paper transaction, Ferguson signed loan documents for a $50,000 loan on a 1994 Mercedes Benz. USAA Federal Savings Bank (USAA Bank) disbursed a $50,000 check, which was deposited into Bhasin's All-Star Auto Broker's account on September 10, 1999. Defendant received $48,000 of the proceeds, from which he paid $20,000 for a car that needed an engine and transmission. Ferguson helped pick up the car, signed the paperwork, and thought the car would be registered with the Department of Motor Vehicles (DMV) in his name. In September 1999 Ferguson applied for a seller's permit. Then he tried to cancel the loan by notifying the bank and the police. Ferguson did not receive any of the loan proceeds or make any loan payments.

Beginning in 1999, defendant and codefendant Lucero, a bookkeeper and accountant who worked for defendant and Bhasin, planned to purchase cars for cash, repair them, and then obtain loans on them under Lucero's name. They would make the loan payments. When they sold the car for a profit, they would split the difference or reinvest the money.

Defendant helped Lucero get a $69,000 car loan by overstating Lucero's salary. Lucero received about $8,000 or $10,000 of the loan proceeds. Eventually, defendant took possession of the car and refused to return it. Defendant then instructed Lucero to prepare a car loan application for Carlos Martinez, and defendant supplied Lucero with Martinez's

social security number, monthly income, and a copy of a driver's license, later shown to be fake. Defendant told Lucero he had a power of attorney for Martinez as used in the normal course of loan processing. Lucero completed and signed the application in the name of Martinez and defendant submitted it to USAA Bank. Defendant also directed Lucero to call USAA Bank as Martinez to expedite the loan. Defendant gave Lucero various documents to sign as Martinez.

Carlos Martinez of San Francisco learned about the loan being obtained in his name when USAA Bank called him to say his check was ready. Martinez had not authorized the use of his name and he did not know the defendant and codefendants in this case.

USAA Bank alerted the postal inspector, who arranged a controlled delivery of the loan documents. In January 2000 the postal inspector, Teri Timar, dressed as a mail carrier, wearing a body wire, and under video surveillance, delivered an express mail package to "Carlos Martinez" at an address on Millsap Street in Moreno Valley.

Defendant picked up the mail, identified himself as Martinez, and signed his name as Martinez. When Timar attempted a second controlled delivery of the loan check on February 4, 2000, a different man (later identified by defendant as Magdy Mikhail) said he was Martinez but would not sign for the package. Timar left a notice that the package could be picked up at the post office.

On February 7, defendant, Ronnie Dawood, and Wagdy Dawood came to the post office. Ronnie and Wagdy approached the counter while defendant stayed by the post office boxes. Wagdy identified himself as Martinez and signed for delivery of a package containing a $68,900 check. As the three men left the post office, postal inspectors arrested them. After his arrest, defendant gave Lucero a document he represented as being the original power of attorney for

Martinez. When he was arrested, defendant had in his possession a credit card in Ferguson's name. Credit card receipts and statements seized by the postal inspectors showed that defendant had used Ferguson's identity to obtain unauthorized credit. Defendant also obtained phone service using Ferguson's name.

The prosecution presented additional evidence about other similar offenses, charged and uncharged, involving identity theft and fraudulent loans and credit, especially involving Peter Olson, masquerading as Jay Potter, a resident of Marin County. Defendant was not convicted of charges based on the latter evidence.

B. *Defense Evidence*

Defendant testified he worked as an automobile broker to pay for his education. He operated the business from other locations using his cell phone and he visited Riverside for long weekends. He paid for cars using credit cards and cash advances. Between August 1999 and February 2000, he was serving a medical residency in Chicago.

In 1997, Bhasin had offered to assist defendant. Together they deposited the proceeds from car sales in Bhasin's master account, All-Star Auto Brokers. Bhasin then transferred the money into another account and paid defendant's credit card bills for car purchases. Bhasin received part of the profits.

Defendant used a customer's personal financial information to obtain preliminary approval for financing and to submit loan applications. Lucero assisted defendant locally and received 10 percent of the profit on any completed loans. Defendant gave Lucero powers of attorney and information for loan applications. Lucero submitted the information to banks for approval. Several witnesses testified that, when they contacted defendant about car loans, he referred them to Lucero, who offered for $500 to obtain false pay stubs for them. Lucero warned them not to tell defendant. On rebuttal,

Lucero denied this testimony.

Ferguson sought defendant's help to improve his credit. Ferguson gave defendant his social security number, date of birth, and driver's license number, which defendant then passed on to Lucero. To improve Ferguson's mediocre credit, Ferguson, defendant, and Bhasin entered into a venture, Custom Mot , to buy, repair, and sell classic cars. Bhasin and Ferguson applied for credit cards in the name of Custom Motors. Defendant and Bhasin paid the bills. The plan was for Ferguson to take out a loan on the cars. The loan proceeds would be used by defendant and Bhasin to repair the cars and they would split the profits three ways.

Defendant and Bhasin each put up $10,000 to buy a Mercedes Benz without an engine or transmission. Lucero applied for a $50,000 loan in Ferguson's name. Defendant reviewed the final loan documents and was present when Ferguson signed them. After the loan proceeds were deposited in Bhasin's account, defendant and Bhasin were repaid their investment and the remainder was used for repairs and to make the loan payments. Defendant bought an engine and transmission for $6,900. Bhasin also used the proceeds to make credit card payments for business expenses. The loan was to be paid off when the car was sold. Bhasin stopped making the loan payments when defendant and Ferguson had a falling out about the car being missing.

Lucero wanted to buy a Mercedes Benz defendant had purchased for $38,000. Defendant and Lucero agreed to seek a $69,000 loan on which they would alternate the payments and then split the profits when they sold the car. Lucero applied for the loan and paid defendant $38,000 from the proceeds. After Lucero claimed the car had problems, defendant paid for some repairs and kept the car. In 1999, defendant met a man calling himself Martinez (actually Mikhail) who was interested in buying a convertible.

Defendant identified the man in the videotape of the second controlled delivery as Martinez. Mikhail, acting as Martinez, gave defendant his personal financial information and signed a power of attorney. At defendant's request, Lucero estimated the loan amount Martinez could qualify to receive was between $60,000 and $70,000 for a Mercedes Benz. Defendant denied giving Martinez's employment or tax information to Lucero, or telling Lucero to make phone calls on behalf of Martinez to USAA Bank. Defendant was present for the first controlled delivery in January because Lucero had told him to be there to pick up loan documents. Defendant identified himself as Martinez because he had the power of attorney. Defendant also visited the post office on Lucero's instructions. Defendant asked Wagdy to stand in line for the package. Defendant did not think the package contained a check. Mikhail, who did not testify, told a defense investigator, Dan Goldsmith, that he was the person present at the second controlled delivery in February. Mikhail said he learned from Potter how to use other people's identities to obtain credit cards and cars. Potter gave Martinez's identification to Mikhail. Mikhail contacted defendant, told him he was Martinez, and asked to buy a Mercedes Benz. Mikhail did not intend to repay the loan.

3. Profile Evidence

Defendant argues, in exhaustive detail, that two prosecution experts, Timar and Fox, a police detective, should not have been allowed to testify that voluminous documentary evidence constituted "identity theft" profile evidence (Timar) and was "consistent with fraud" (Fox). The People argue the evidence was not true profile evidence and was properly admitted as expert testimony. As described in *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084, "[a] profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime," particularly drug couriers. California cases

have declared profile evidence to be inherently prejudicial. (*Id.* at 1085; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072; *People v. Derello* (1989) 211 Cal.App.3d 414, 426.)

On the other hand, courts make a distinction between profile evidence and background testimony or evidence of modus operandi when it serves to explain or illuminate the evidence for the jury. (*U.S. v. Campos* (9th Cir. 2000) 217 F.3d 707, 712-713; *People v. Lopez* (1994) 21 Cal.App.4th 1551, 1554-1556; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1216-1217; *U.S. v. Johnson* (9th Cir. 1984) 735 F.2d 1200, 1202; *People v. Clay* (1964) 227 Cal.App.2d 87, 95.) The admission of such evidence is reviewed for an abuse of discretion, i.e., whether the probative value is substantially outweighed by the prejudicial effect. (Evid. Code, § 352; *Harvey, supra,* at pp. 1227-1228; *People v. Martinez, supra,* 10 Cal.App.4th at p. 1006.)

Profile evidence has been defined as "'a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.' (*U.S. v. McDonald* (10th Cir. 1991) 933 F.2d 1519, 1521.)" (*Robbie, supra,* 92 Cal.App.4th at p. 1084.) In other words, profile evidence represents a stereotype about criminal behavior, appearance, or personality, "offered to . . . condemn the defendant for fitting it." (*Id.* at p. 1087.) We agree the prosecutor's experts' opinions did not constitute true profile evidence.

In the present case, the two experts did not offer any testimony about defendant's behavior, appearance, or personality. The profile evidence, as identified by Timar, was the personal financial information of numerous individuals, not a profile of the type of criminal who engages in credit card or loan fraud. Instead, the two experts properly explained to the jury the voluminous evidence about how credit card and loan

financing fraud operates without using improper profile evidence. Furthermore, any error was harmless in view of the strong evidence of defendant's admitted level of involvement with two admittedly fraudulent car loans. (*People v. Derello, supra,* 211 Cal.App.3d at p. 426.)

4. Instructions Regarding Consciousness of Guilt and Witness Credibility

Before the presentation of evidence, the trial court read the jury instructions on witness credibility (CALJIC No. 2.20), evaluating witness testimony (CALJIC No. 2.21.1), willfully false witness (CALJIC No. 2.21.2), and weighing conflicting testimony (CALJIC No. 2.22). In the final reading of instructions, the court skipped over the four instructions, saying, "Some of these have been given earlier, so I'm not going to bore you by repeating them." The court's reading of the final instructions apparently took two and a half hours. The jury was given copies of all the instructions, including those omitted from the final reading.

Over defense objections, the court gave a series of instructions about defendant or witnesses fabricating or suppressing evidence. (CALJIC Nos. 2.04, 2.05, 2.06.) The court also gave an amended version of CALJIC No. 2.04 about a witness, other than defendant, giving false testimony.

Defendant claims the instructions given and the instructions omitted weighted the instructions in favor of the prosecution and caused a violation of defendant's constitutional rights. We disagree. Because the court read the instructions to the jury, *People v. Murillo* (1996) 47 Cal.App.4th 1104, involving error in omitting a jury instruction, does not apply. It was not error to avoid repeating CALJIC Nos. 2.20, 2.21.1, 2.21.2, and 2.22 at the end of the trial. The timing of instructions is within the trial court's discretion. (*People v. Webb* (1967) 66 Cal.2d 107, 128; *People*

v. Chung (1997) 57 Cal.App.4th 755, 758; § 1093, subd. (f).) No abuse of discretion occurred where the court deliberately omitted the instructions to try to avoid duplication and to save time during its prolonged instructions to the jury.

Regarding the consciousness of guilt instructions, defendant argues there was not sufficient evidence to give them based on the prosecution's theory that defendant or defense witnesses fabricated testimony and evidence. The People contend the evidence is sufficient.

Both parties cite well settled standards: "'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.[Citation.] Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.' [Citation.]" (*People v. Hart* (1999) 20 Cal.4th 546, 620.)

We hold the evidence supported giving the instructions because some of the defense evidence was highly questionable. The three women who testified that Lucero offered to help them prepare fraudulent car loan applications all repeated the same rehearsed story, one which Lucero denied. Next, defendant first said he could not produce a $6,900 receipt for the Mercedes Benz engine and transmission he had purportedly purchased. Later in the trial, however, he was suddenly able to produce the receipt. Additionally, there was the highly fortuitous eve-of-trial midnight rendezvous in a parking lot between defense investigator Goldsmith and the mysterious

Mikhail, who claimed he had pretended to be Martinez and that he had learned from Potter how to practice identity fraud. Finally, there was evidence defendant tried to conceal incriminating documents found hidden behind a mirror at his home.

There was no direct evidence of defendant procuring false testimony or fabricating or suppressing evidence. (*People v. Crew* (2003) 31 Cal.4th 822; *People v. Jackson* (1996) 13 Cal.4th 1164; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1139; *People v. Smith* (1956) 142 Cal.App.2d 287, 294.) But the trial court could reasonably determine sufficient evidence supported that defendant or defense witnesses had given false testimony or fabricated evidence and that defendant had attempted to suppress evidence.

Furthermore, notwithstanding any error in giving the consciousness of guilt instructions, the instructions were, at worst, superfluous and reversal is not warranted if the conviction is otherwise supported by the evidence. (*People v. Pride* (1992) 3 Cal.4th 195, 248-249.) Here the evidence is quite strong that defendant, while employing Ferguson and Lucero either as dupes or accomplices, obtained fraudulent car loans and kept most of the proceeds for himself. Any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

5. Conspiracy and Double Jeopardy

Count 2 of the third amended information charged defendant and three of his codefendants with conspiracy to violate section 530.5, unauthorized use of personal identifying information to obtain credit, goods, or services: "Every person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services . . . is guilty of a public offense . . . ." (§ 530.5, subd. (a).)

Based on the same five overt acts as count 2, count 4

charged defendant and the same codefendants with conspiracy to violate section 532, subdivision (a): "Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real or personal, or who causes or procures others to report falsely of his or her wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained."

Defendant strenuously maintains that, because the same conspiracy is alleged in the two counts, count 4 must be stricken. The two counts, however, clearly describe different and separate crimes. In the present case, defendant violated section 530.5 (count 2) by conspiring to steal the personal identifying information of Martinez and using or trying to use it unlawfully. Defendant violated section 532 by conspiring to use Martinez's information to defraud USAA Bank of money. The first crime could have been completed without the second ever being accomplished.

We reject defendant's effort to collapse his two crimes into one. This situation is not comparable to one in which a defendant cannot be convicted simultaneously of conspiracy to manufacture methamphetamine, to dispose of hazardous substances illegally, and to possess methamphetamine. (*People v. Lopez, supra,* 21 Cal.App.4th at pp. 1557-1558.) In that instance, all the conduct was directed at the single objective of selling methamphetamine for financial gain. Here, the acquisition and use of Martinez's personal identifying information precedes and is different from the act of dispossessing the bank of its money.

6. Forgery

Count 7 charged defendant with forgery by receiving the

USAA Bank check payable to Martinez in the amount of $68,900. Defendant argues this was not a violation of section 475, subdivision (c): "Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery."

Defendant reasons that it was never intended that USAA Bank would issue a check directly to Martinez. Instead, the current lienholder, LaSalle Bank, would be paid off. USAA Bank deviated from its normal procedures as part of the postal inspector's sting operation. But the check was made subject to a stop payment order and could never have been negotiated. It was not a "completed check" within the meaning of the statute. Furthermore, defendant thought he was picking up loan documents, not a check, from the post office on February 7. Meanwhile, Lucero may have thought the check would be made out jointly to Martinez and LaSalle Bank for Martinez to endorse and forward to LaSalle Bank. Even if this were so, however, defendant still would not have been expecting to receive a check payable only to Martinez. Based on this version of the facts, defendant challenges his conviction for forgery on count 7.

As defendant concedes, the statute does not require a completed check be genuine. A completed check may be either "real or fictitious." (*People v. Bartsch* (1963) 217 Cal.App.2d 318, 321.) *People v. Burke* (1974) 38 Cal.App.3d 708, 711, relied upon by defendant, does not compel a different conclusion because it involved a different statute and the possession of stolen blank bank drafts, not checks.

Instead, we hold there was sufficient evidence that defendant knew he possessed a check fraudulently. At one point in Lucero's telephone conversation with USAA Bank, he appeared to accept the bank employee's explanation that the

check would be issued jointly to Martinez and to the supposed seller, Lucero himself. At other points, Lucero, pretending to be Martinez, seemed to understand the check would be to Martinez and LaSalle Bank. Under the prosecution's theory of the case, Lucero was communicating all this information to defendant. Therefore, whether USAA Bank's check was issued either to Martinez and Lucero or to Martinez and LaSalle Bank, the jury could plausibly find that defendant intended to obtain possession of and negotiate the $68,900 check, thus defrauding USAA Bank, or La Salle Bank, or both. The standard of review governing substantial evidence requires us to accord proper deference to the jury's express and implied findings on this issue. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

7. Section 654

The trial court sentenced defendant to two years on count 1 for identity theft; eight months stayed on count 2 for conspiracy to commit identity theft; four months stayed on count 3 for theft by false pretenses; eight months consecutively on count 4 for conspiracy to commit theft by false pretenses; eight months consecutively on count 5 for forgery; eight months consecutively on count 6 for forgery; and eight months consecutively on count 7 for possession of a completed check with intent to defraud. We have already rejected defendant's argument that count 2 or count 4 will have to be voided. Additionally, defendant argues that counts 4, 5, 6, and 7 will have to be stayed under section 654 as part of a single criminal objective, that is, obtaining the fraudulent Martinez loan. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615; *People v. Cavanaugh* (1983) 147 Cal.App.3d 1178, 1182-1183; *People v. Skelton* (1980) 109 Cal.App.3d 691, 727; *In re Cruz* (1966) 64 Cal.2d 178, 180.) In other words, for purposes of this argument, defendant accepts only the two-year sentence on count 1 as legitimate.

We conclude, however, that defendant may be separately punished for the multiple crimes of identity theft, conspiracy to commit theft by false pretenses, two counts of forgery, and possession of a completed check with intent to defraud. In *Ramirez*, *Cavanaugh*, and *Skelton*, the courts issued narrowly-stated holdings that it violates section 654 to punish both a substantive offense and its related conspiracy. That is not the situation here. Defendant has been sentenced on four substantive offenses -- identity theft, two forgeries, and fraudulent possession of a completed check – and a separate conspiracy to commit theft by false pretenses.

Defendant relies on the broader language used in *Cruz*, in which the court said: "The prohibition in section 654 against multiple punishment applies not only where one act in the ordinary sense is involved but also where there is a course of conduct that violates more than one statute and comprises an indivisible transaction. The divisibility of a course of conduct depends upon the intent and objective of the defendant, and if all the offenses are incident to one objective the defendant may be punished for any one of them but not for more than one." (*In re Cruz, supra,* 64 Cal.2d at p. 180.)

But making that determination is the province of the trial court and necessitates appellate deference: "The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citation.]" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313, citing *People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

Here sufficient evidence exists to support the trial court's sentencing choices. The original identity theft, the subsequent acts of two separate forgeries of Martinez's name, and the final possession of the $68,900 check, all gave the trial court reasonable grounds on which to sentence defendant separately for four individual crimes and does not permit this court to disturb that determination.

8. Cumulative Instructional and Evidentiary Error

Defendant enumerates multiple instances of instructional and evidentiary error that he contends cumulate to form a due process violation of his constitutional right to a fair trial. We find no such error or violation.

A. *CALJIC No. 2.11.5*

Defendant challenges the use of CALJIC No. 2.11.5, as given, concerning an unjoined perpetrator of the same crime: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of each defendant on trial."

Specifically, defendant asserts the jury was entitled to evaluate Ferguson's credibility in light of him not being prosecuted. (*People v. Williams* (1997) 16 Cal.4th 153, 226.) He argues that the instruction tended to undermine the possibility that the jury would find Ferguson liable as an accomplice whose testimony should be viewed with caution and would need corroboration.

The People respond that the instruction was necessary because both Bhasin and Wagdy were charged originally but had been severed from the case by the end of trial, Bhasin because he was arrested on new fraud charges during the trial.

We are not convinced by defendant's effort to argue the instruction was not necessary because the jury must have known Bhasin and Wagdy were being prosecuted in another trial.

Although the jury knew they had been charged, the record does not give any information about what the final outcome was regarding Bhasin and Wagdy. The jury had no basis on which to speculate on this subject and were instructed not to do so. Furthermore, the People point to the lack of sufficient evidence that Ferguson, a rather pathetic-seeming methamphetamine user, had any role other than as defendant's dupe. Defendant, not Ferguson, received the loan proceeds. Ferguson tried to cancel the loan when he realized it was a fraud. Ferguson was almost certainly not an accomplice or an unjoined perpetrator.

Not only are the People's arguments more persuasive, but any error is harmless because the jury received CALJIC No. 2.20, concerning the credibility of witnesses generally. (*People v. Williams, supra,* 16 Cal.4th at p. 227.) The jury was also given CALJIC Nos. 3.18 and 3.19, concerning the burden to prove that a corroborating witness is an accomplice and viewing the testimony of an accomplice with caution. If the jury had concluded Ferguson was an accomplice, nothing contained within CALJIC No. 2.11.5 prohibited them from considering CALJIC Nos. 2.20, 3.18, and 3.19. The instructions are not inconsistent.

B. *Ferguson's Opinion of Defendant's Character*

Ferguson called defendant a "snake," and the court overruled the defense objection. Even if Ferguson engaged in inappropriate name calling, the testimony was relevant to the existence of bias. (*People v. Green* (1980) 27 Cal.3d 1, 19-20, citing Evid. Code, § 780, subd. (f), overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and *People v. Martinez* (1999) 20 Cal.4th 225, 239.) The trial court did not

abuse its discretion in allowing the mild pejorative to be admitted. (*People v. Cunningham* (2001) 25 Cal.4th 926, 995.)

C. *Other Matters*

1. Judicial Misconduct

Defendant claims to have been prejudiced by a rather confusing exchange between the court, the prosecutor, and Bhasin's counsel.(RT 1385-1386} According to defendant, this exchange gave the misleading impression that other charges might be pending against defendant. Having reviewed the exchange, we do not find any such insinuation to be apparent. Furthermore, the trial court instructed the jury that counsel's comments are not evidence. (CALJIC No. 1.02) Therefore, defendant was not prejudiced. (*People v. Boyette* (2002) 29 Cal.4th 381, 448.)

2. Exhibit 204B

As exhibit 204B, the trial court admitted a copy of an e-mail from Ferguson to USAA Bank trying to cancel the loan in October 1999. Defendant asserts the letter was irrelevant and double hearsay. Under Evidence Code section 791, the e-mail was admissible as a prior consistent statement to refute charges of improper motive that were made against Ferguson at trial. The fact that Ferguson's wife typed the e-mail according to his dictation does not make it inadmissible. To the extent it contains some self-serving language, it is still admissible as consistent with Ferguson's general position that he was a victim, not a perpetrator, of the car fraud scheme.

3. Limits on Defendant's Testimony

Defendant complains the court repeatedly placed unfair limits on much of his testimony as not being received for the truth of the matter but, rather, only as evidence that a statement was made or as a prior inconsistent statement. (Evid. Code, §§ 780, cl. (h) & 1235.) Defendant protests he was deprived of his constitutional right to present his own testimony in defense. (*Rock v. Arkansas* (1987) 483 U.S. 44.)

There was no error. Defendant concedes that there was no contradiction (and no prejudice) when both Ferguson and defendant testified similarly that there was a plan to improve Ferguson's credit. As to the various other instances involving defendant's testimony, there was a divergence in the testimony between Ferguson and defendant about Custom Motors and how it was to be operated. But defendant's testimony was either speculative or did not qualify as prior inconsistent statements admissible as true. (Evid. Code, §§ 780, cl. (h) & 1235.)

Defendant's testimony about what Lucero told him about picking up the package from USAA Bank was also properly limited, for purposes of impeachment only and not for the truth of the matter asserted, to show why defendant went to the Moreno Valley address where the package was being delivered.

The trial court did not abuse its discretion in restricting some of defendant's hearsay testimony. Furthermore, the occasional limitation placed by the court on defendant's lengthy testimony did not rise to the level of constitutional error (*People v. Cunningham, supra,* 25 Cal.4th at p. 999; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103) and was harmless when considered in light of the whole record (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4).

4. Timar's Testimony About the Martinez Power of Attorney

Defendant's contention that postal inspector Timar was permitted to testify regarding the legal effect of a power of attorney is not supported by the record. The court limited her testimony about powers of attorney to "postal matters but not in any other area requiring expertise." Defendant was also allowed to present his own expert to testify favorably regarding the custom and practice concerning powers of attorney in the car loan business. No error was shown on this issue.

5. Judicial Error

Defendant next complains about the court's half-dozen references during the lengthy trial about the possibility of an appeal or retrial in the case and one comment about it being "the duty of the district attorney . . . to see that justice is done." Such remarks may have been inappropriate because of "the possible risk of giving a jury a cue from the judge of his opinion of certainty of guilt." (*People v. Alfaro* (1976) 61 Cal.App.3d 414, 426.) But, like the *Alfaro* court, "we do not believe in this case such error was prejudicial or that such danger existed." (*Ibid.*) The comments focused on preserving the finality of the jury's verdict, whatever it might be, so there would not be an appeal or a retrial. Furthermore, even if there was a plausible defense, the evidence in this case was quite strong against defendant and not as close as he would like to characterize it.

Additionally, "[t]he conduct of the trial judge was not prejudicial, improper or intemperate. Not only *may* he join in questioning and take part in the determination of the truth [citations], but he has a duty to see that both sides receive a fair trial and that justice is done. [Citations.] The remarks of the court were not in the slightest . . .inappropriate . . . [or] intemperate. . . ." (*People v. Alfaro, supra,* 61 Cal.App.3d at p. 427.) Similarly, the trial court's comment about the district attorney's duty was not part of a pattern of judicial hostility, belittling, humiliation, scolding, or sarcasm toward any of the parties or their counsel. (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1170, 1172-1173.) There is also no reasonable probability the trial court's comments about a retrial could have affected the jury's deliberations. (*People v. Andrews* (1989) 49 Cal.3d 200, 221, disapproved on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.)

Finally, the court instructed the jury not to take its cue from the judge (CALJIC No. 17.30), thus dispelling any

prejudice. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 158.)

6. The Bhasin-related Evidence

After codefendant Bhasin was arrested during trial, the court denied defendant's motion for mistrial. Instead, the court told the jury to disregard the opening statement and the evidence related to Bhasin. Defendant points to a myriad of error arising from the trial court's procedure. In particular, defendant is concerned about exhibit D and the testimony concerning it. Exhibit D is a vehicle registration document, identifying Ferguson as the registered owner of the 1994 Mercedes Benz and issued on October 3, 2002, during trial. In its instruction to the jury, the court stressed that Bhasin may have created exhibit D and it was being stricken from the record. In his reply brief defendant asserts the basis for the mistrial was "the prosecution evidence that Bhasin had committed an act of obstruction of justice in filing DMV papers on the Ferguson car deal during trial. Bhasin's connection to [defendant] was so close that no instruction could [undo] the prejudice to [defendant.]" In other words, there was a spillover effect created by the evidence of Bhasin's apparent wrongdoing that tainted defendant. (*Holmes v. U.S.* (4th. Cir. 1960) 284 F.2d 716, 719; *U.S. v. Patterson* (9th Cir. 1981) 648 F.2d 625, 630; *U.S. v. Keating* (9th Cir. 1998) 147 F.3d 895, 904.)

Of course the jury was instructed to disregard the Bhasin-related evidence. We must presume it did so in spite of doubts expressed that such distinctions are impossible for a jury to make. (*Krulewitch v. U.S.* (1949) 336 U.S. 440, 453; *People v. Albertson* (1944) 23 Cal.2d 550, 577; *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) Nevertheless, the prosecutor's argument that defendant could be criminally liable for the acts and statements of his coconspirators correctly stated the law. (*People v. Hardy* (1992) 2 Cal.4th 86, 188.)

In any case, any error was not prejudicial. The evidence that Bhasin may have falsified the vehicle registration to implicate Ferguson, as well as the other evidence against Bhasin as described by defendant, was as likely to exculpate defendant as inculpate him. It is not reasonably probable the jury would have reached a result more favorable to defendant. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Nor are we convinced that removing the Bhasin-related evidence meant the conspiracy to commit theft by false pretenses alleged in count 9 against defendant, Bhasin, and other unnamed conspirators lacked sufficient evidence. Defendant was not convicted of conspiring with himself. (*People v.* (1996) 46 Cal.App.4th 1119, 1128.)

Even after Bhasin had been severed from the case, evidence was admitted that Bhasin received money from USAA Bank for the fraudulent loan and disbursed part of it to defendant. Defendant himself testified regarding his plan with Bhasin to buy and sell cars using Ferguson's identity. Sufficient evidence supported count 8, the substantive count, and count 9, the conspiracy count.

7. Prosecutorial Error

In closing argument, the prosecutor observed that defendant's brother, Ronnie Dawood, became visibly upset when defendant testified inconsistently about whether his own credit was good or bad. The general rule is a prosecutor may not comment on the behavior or demeanor of a nontestifying defendant because it infringes on defendant's right not to testify. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.) But commenting on Ronnie's demeanor did not infringe on defendant's right not to testify. The general rule "can have no application to a case . . . where the defendant has testified and put his credibility in issue." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1031.)

Even if error occurred, the prosecutor's "brief and

fleeting" comment was hardly prejudicial and did not qualify as deceptive or reprehensible. (*People v. Boyette, supra,* 29 Cal.4th at pp. 434-435; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) A more favorable result was not reasonably probable if the comment had not been made. (*People v. Medina* (1990) 51 Cal.3d 870, 896.)

8. Jury Receiving Copies of the Information

Before giving the jury, at its request, copies of the information, the trial court had previously instructed the jury that it was not evidence of guilt that defendant was charged with crimes. (CALJIC No. 1.00.) Therefore, no error occurred under the three cases cited by defendant, *U.S. v. Ramirez* (9th Cir. 1983) 710 F.2d 535, 545; *Garner v. U.S.* (6th Cir. 1957) 244 F.2d 575, 577; and *People v. Jones* (Mich.Ct.App. 1983) 340 N.W.2d 302, 303.

9. Consecutive Sentences

The court sentenced defendant to a two-year base term on count 1 and five consecutive eight-month terms on counts 4 through 8. The court based its consecutive sentencing on the seriousness, sophistication, and professionalism of defendant's crimes.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the court determined that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." In June 2004, the United States Supreme Court decided *Blakely*, extending *Apprendi* to circumstances where a defendant's punishment is increased by the use of facts other than those based solely on a jury verdict or a plea. Defendant argues, based on *Blakely*, that he was entitled to a jury trial as to those factors which determine whether consecutive sentences may be imposed as provided by section 669. There is no statutory presumption favoring concurrent rather than consecutive sentences for

multiple offenses. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Even if defendant has not waived the *Blakely* issue on appeal, we agree with the reasoning of the California appellate cases that have already held neither *Blakely* nor *Apprendi* create the right to a jury trial on the determination as to whether to impose consecutive sentences and are currently under review by the California Supreme Court in *People v. Black*, S126182. (*People v. Sykes*, S127529; *People v. Vonner*, S127824.)

"The consecutive sentencing decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses—this fully complies with the Sixth Amendment jury trial and the Fourteenth Amendment due process clause rights. The condition of two or more convictions before imposing consecutive sentences is easily satisfied in this case in which defendant has suffered nine convictions.

10. Disposition

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
s/Gaut J.
We concur:
s/McKinster
Acting P. J.
s/Richli J.

Court of Appeal, Fourth Appellate District, Division Two - No. E033792
S132413

IN THE SUPREME COURT OF CALIFORNIA
En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAMAL NATHAN DAWOOD,
Defendant and Appellant

SUPREME COURT
FILED
May 18 2005
Frederick K. Ohlrich Clerk
DEPUTY

Petition for review denied without prejudice to any relief to which defendant be entitled after this court determines in *People v. Black*, 5126182, and *People v. Towne*, S 125677, the effect of *Blakely v. Washington* (2004) __ U.S. __ 124 S.Ct. 2531, on California law.

GEORGE
Chief Justice